

EXHIBIT M

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM: PART 48

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3 NORTH STAR DEBT HOLDINGS, LP, SILVER OAK
4 CAPITAL, LLC, AG CREDIT SOLUTIONS NON-ECI
5 MASTER FUND, AG CENTRE STREET PARTNERSHIP, LP,
6 AG SUPER FUND MASTER, LP, and GAMUT CAPITAL
7 SSB, LLC,

Plaintiffs,

INDEX NO.

8 - against -

9 SERTA SIMMONS BEDDING, LLC, ADVENT
10 INTERNATIONAL CORPORATION, EATON VANCE
11 MANAGEMENT, INVESCO SENIOR SECURED MANAGEMENT,
12 INC., CREDIT SUISSE ASSET MANAGEMENT, LLC,
13 BOSTON MANAGEMENT and RESEARCH, BARINGS LLC,
14 and Does 1-50,

Defendants.

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15 Skype Proceedings
16 November 30, 2020

17 B E F O R E:

18 THE HONORABLE ANDREA MASLEY, Justice

19 A P P E A R A N C E S:

20 PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP
21 Attorneys for the Plaintiffs
22 1285 Avenue of the Americas
23 New York, New York 10019
BY: LEWIS CLAYTON, ESQ.
BY: ANDREW EHRLICH, ESQ.
BY: RYAN RIZZUTO, ESQ.

24 FRIEDMAN KAPLAN SEILER &ADELMAN, LLP
25 7 Times Square - Floor
New York, New York 10036
BY: ANNE BEAUMONT, ESQ.

26 A P P E A R A N C E S:

1 WEIL GOTSHAL & MANGES, LLP
2 Attorneys for Defendant Sert Simmons
3 767 Fifth Avenue
4 New York, New York 10153
5 BY: DAVID LERNER, ESQ.

6 GIBSON, DUNN & CRUTCHER, LLP
7 Attorneys for the Lender Defendants
8 200 Park Avenue
9 New York, New York 10166
10 BY: RANDY MASTRO, ESQ.

11 ROPES & GRAY
12 Attorneys for Defendant Advent International
13 Corporation
14 1211 Avenue of the Americas
15 New York, New York 10036
16 BY: DAN McCaughey, ESQ.
17 BY: LOGAN PETTIGREW, ESQ.

18 FRESHFIELDS BRUCKHAUS DERINGER US LLP
19 Attorneys for Barings LLC
20 520 Madison Avenue - 24th Floor
21 New York, New York 10022
22 BY: MADLYN PRIMOFF, ESQ.

23 William Cardenuto
24 Senior Court Reporter

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1 2:31 p.m.

2 THE COURT: Hi. Good afternoon. In the matter
3 of North Star Debt Holdings LP against Serta Simmons
4 Bedding. I see the court reporter is here as well as one
5 or two other people including some students from CUNY Law
6 School's New York practice class. So I'll ask you to keep
7 that in mind when you're speaking, and if you can take a
8 moment to help out our students, I would appreciate it.

9 It's 2:31. I'm going to ask each party to have one
10 speaker and have that one speaker put everyone's
11 appearance on the record, and I would ask that everyone
12 turn off their microphones unless they are speaking.
13 Okay. So who do we have representing North Star Debt
14 Holdings LP and the plaintiffs?

15 MR. CLAYTON: Your Honor, Lewis Clayton from
16 Paul Weiss. I think I will be our one speaker, and my
17 colleagues Andrew Ehrlich and Ryan Rizzuto of Paul Weiss
18 are also with me. I think we also have a representative
19 from the Friedman Kaplan firm.

20 THE COURT: Okay. Can I have that attorney make
21 an appearance, please, from Friedman Kaplan.

22 MS. BEAUMONT: Hello, your Honor. This is Anne
23 Beaumont from Friedman Kaplan.

24 THE COURT: And for defendants who is going to
25 be speaking?

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1 MR. LENDER: Your Honor, this is David Lender
2 from Weil Gotshal on behalf of the company Serta Simmons
3 Bedding LLC, and I'll be speaking on behalf of the
4 company, and I believe I have on as well my colleague,
5 Luna Barrington, also Weil Gotshal.

6 THE COURT: Okay. And then we have the lender
7 defendants.

8 MR. MASTRO: Randy Mastro, Gibson, Dunn and
9 Crutcher on behalf of the lender defendants. While I have
10 colleagues with me as well, I will be doing the
11 speaking.

12 THE COURT: Okay. Thank you.

13 MR. McCaughey: Your Honor, if I may, this is
14 Dan McCaughey from Ropes and Gray on behalf of Advent.

15 THE COURT: Let's finish with Advent, and who is
16 with you?

17 MR. McCaughey: Logan Pettigrew also from Ropes
18 and Gray.

19 THE COURT: Thanks. And I heard someone else
20 wanted to make an appearance.

21 MS. PRIMOFF: Yes, your Honor. Madlyn Primoff
22 from Freshfields, Bruckhaus and Deringer US LLP on behalf
23 of Defendant Barings.

24 THE COURT: Thank you. Anyone else before we
25 all turn our microphones off and we hear from the

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1 plaintiffs on their motion to discontinue the action? No?

2 Thank you.

3 Mr. Clayton.

4 MR. CLAYTON: Thank you very much, your Honor.

5 We appreciate the Court's time today in particular under
6 these circumstances. Under CPLR 3217 a motion for
7 discontinuance without prejudice, which is this motion, is
8 to be granted absent a showing of prejudice by the
9 defendants. We quoted a number of authorities in our
10 papers. The First Department said it in Bank of America.
11 "Absent special circumstances such as prejudice to adverse
12 parties a discontinuance should be granted." There is no
13 cognizable prejudice here. The case is still at its very
14 earlier stage. Our motion to discontinue without
15 prejudice was made, by my count, 29 days after the
16 complaint was filed. I think the complaint was filed on
17 June 11th. The motion was made on July 10. There's been
18 no discovery. We've gotten one or two pieces of paper,
19 and I'm speaking literally there, from the defendants.
20 There's been no document production.

21 THE COURT: Right. But we had quite a bit of
22 paper on the motion for the injunction; right?

23 MR. CLAYTON: That's what we had, your Honor.
24 What we had was those -- that preliminary ruling by the
25 Court on our request for injunctive relief, and there's

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1 cases, and we've cited them, where discontinuance occurs
2 even after those kinds of preliminary rulings. The really
3 question is whether there is prejudice here to the
4 defendants based upon what has happened so far, and I
5 would submit that at the earliest stages of the case, and
6 this is an early stage of the case, because as I'll say --

7 THE COURT: I'm going to interrupt, Mr. Clayton.

8 This is Motion 11. You know, it's kind of hard to --

9 MR. CLAYTON: Well, I'll tell you why. Your
10 Honor, look, I accept that and I invite the Court's
11 questions, and I want to explain why I say it's at the
12 early stage.

13 THE COURT: I'm sorry. Somebody has got to turn
14 off their microphone, because I'm hearing typing, very
15 fast.

16 MR. CLAYTON: We don't know how accurate.

17 THE COURT: Go ahead, Mr. Clayton.

18 MR. CLAYTON: Your Honor, here's why I say it's
19 at the early stages, because if the motion to discontinue
20 without prejudice is denied, we're going to be filing an
21 amended and supplemental complaint. There's a stipulation
22 we've entered into with the defendants. That complaint is
23 due 14 days after the Court's ruling on this motion. This
24 case is going to be much broader and deeper and longer if
25 it proceeds here than what has happened so far, and none

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of the arguments -- the plaintiffs have to establish some prejudice from the fact that the case will continue, and let me tick off the arguments that I understand that they are making as to prejudice, because we believe none of those arguments amount to prejudice under the case law or under 3217. The first argument is, well, if there's a discontinuance without prejudice here, there may well be later litigation. That's true, but that is not prejudice under the CPLR. If that was prejudice, then very few, if any, motions to discontinue without prejudice would be granted, because the discontinuance without prejudice -- the without prejudice part of that ruling is exactly to allow the plaintiff to reinstitute litigation. So that is not prejudice that is counted -- that makes a difference under 3217, and as I said, we will be filing, if the motion is denied, an amended and supplemental complaint. We submitted to your Honor some of the papers in the federal court action. We really submitted them, because they indicate some of the issues that will arise in this case and are now being litigated in the federal court. The motion to dismiss in the federal court is fully briefed, and it will be argued, I think, on January 14, if I have the date correct. I think that is correct, and unless that case is dismissed, that litigation will continue. It is obviously proceeding right now. So the

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1 defendants are in litigation right now in the federal
2 court on this transaction. We didn't file the litigation
3 in federal court, and we're not prosecuting the litigation
4 in federal court. If the motion is denied, we will file
5 our amended and supplemental complaint. They will not be
6 free of litigation. They will have a second litigation.
7 So, yes, they argue that, well, we prepared our papers in
8 opposition to the preliminary injunction motion. Again,
9 that is not prejudice to them. We sought injunctive
10 relief. We had to seek it on an emergency basis. We did
11 not know that there are some significant details of the
12 transaction. We did not know when that motion was
13 briefed. Some of them have come out now. Some of them
14 create additional claims and additional reasons why we
15 think that transaction was improper. So to say, for
16 example, well, we spent a lot of time on the preliminary
17 injunction motions, that is an investment that's been
18 made. Frankly, it's an investment that paid off for the
19 defendants, because they successfully defeated our request
20 for injunctive relief, but having spent that money is not
21 prejudice. Quoting the First Department, the Eugenia
22 case, in our reply papers at Page 7, "Delay, frustration
23 and expense in preparation of a contemplated defense do
24 not constitute prejudice warranting denial of a motion for
25 voluntary discontinuance." Now, the next argument they

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1 make, I suppose the argument they make with the greatest
2 vigor if you look at adjectives or repetition, you know,
3 the usual measures of lawyerly vigor on paper, is the
4 argument that we're avoiding a motion to dismiss that has
5 been filed on the current complaint. We're not avoiding a
6 ruling on that motion, because I respectfully submit there
7 will be no ruling on that motion, because if the case
8 continues, what will happen is we're going to file an
9 amended and supplemental complaint. If they choose to
10 move to dismiss that amended and supplemental complaint,
11 that will be the pleading that the Court considers, not
12 the current pleading, and that case, that amended and
13 supplemental complaint which creates that case will be
14 materially different from the case here, and one reason
15 that we submitted the federal papers to your Honor was to
16 tick off some of the points that are already being raised.
17 Let me give you one example, and I'm simply here giving
18 examples of what is being alleged in the federal case, and
19 I think it shows that the case, as it appeared on that
20 motion for a preliminary injunction, is actually far less
21 complex than the case will be going forward. I'm in no
22 way criticizing the Court's ruling. A motion, as your
23 Honor knows, a TRO and a preliminary injunction done on a
24 very quick basis, we didn't have full information. That
25 is the nature of the beast. So let me give you one

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example. As the defendants have made clear, their argument is that this transaction was appropriate, because it was based on an exchange of debt which they say qualified as an open market purchase under the credit agreement, and your Honor mentioned that argument and found no likelihood of success, as I read your Honor's opinion, in significant measure on that basis. There was no briefing of any significance. There was no evidence taken on the question of what is an open market purchase. Well, if you look at the federal papers in this case, if you look at the opposition to the motion to dismiss filed by the plaintiffs in federal court, they have a section, Pages 10 to 13, talking about open market purchase, and they argue, and one could argue that they argue with great force and great persuasion, that this was not an open market transaction, a phrase not denied in the complaint, and there's one piece of evidence that they put in which is very interesting here. It's on Pages 19 and 20 of their opposition brief. It is a quote from the Weil Gotshal law firm who is representing some of the defendants here, and there's a client alert issued in March of 2009 which is on the Weil Gotshal website as we speak, still there, and it talks about exactly this kind of transaction and exactly what an open market purchase is in connection with the transaction. We didn't submit --

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1 we submitted the brief to your Honor. We certainly can
2 submit the Weil Gotshal private equity alert. It's also
3 available right on the web, and what's it about? It's
4 entitled "Deleveraging Portfolio Companies Through Debt By
5 Facts," exactly what happened here. Then Weil Gotshal has
6 a description of what an open market purchase is. It's on
7 Page 20.

8 THE COURT: Yeah. I'm going to interrupt you on
9 what Weil Gotshal thinks about open market purchases. I
10 get your point that the complaint in the federal court has
11 a bit more detail. Are there any other arguments or
12 prejudices that the defendants raise that you want to
13 address?

14 MR. CLAYTON: Yes, I do, but I just, if I may,
15 would like to come back to just one second to this
16 question of open market purchases, because the idea that
17 this case goes on a motion to dismiss just on the basis of
18 what is in the last complaint, if that is the idea that
19 defendants have in mind when they say we're just trying to
20 avoid a ruling on a motion to dismiss that original
21 complaint, I think that is fundamentally misguided,
22 because if you look at the factors here, if you look at
23 that definition of open market purchases, it does -- if
24 that definition is right, it doesn't fit. So let me go
25 onto the other arguments. The other arguments are --

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1 THE COURT: You're trying to avoid me. That is
2 really the big one.

3 MR. CLAYTON: Well, yes, but that's the one I'm
4 kind of addressing, your Honor. Here's what is happening.
5 There is going to be a ruling in the federal court on the
6 motion to dismiss. If we want to press our claim, they
7 are saying -- first of all, your Honor, we're not -- we're
8 not -- I would tell you we're not trying to avoid you.

9 THE COURT: I won't take it personally. With
10 440 cases, I don't have a problem.

11 MR. CLAYTON: I did not think so. They say
12 we're doing the avoid Justice Masley argument is, you
13 know, comes in two flavors; one is called forum shopping,
14 and the other is judge shopping. We're not shopping at
15 all. We're not forum shopping because --

16 THE COURT: So then why discontinue the action
17 and not just ask for a stay pending the federal action?

18 MR. CLAYTON: Let me tell you why. First of
19 all, I just want to go into our reasons, but I simply
20 hasten to add that under the rules, we don't have to state
21 a reason, but we have very significant reasons. Here are
22 the reasons. There's three basic reasons. One is we want
23 to see what develops with the company's own finances.
24 This case is about our position in the capital structure.
25 We want to see what happens with Serta. That's point one.

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1 Point two, one of the arguments that they raise -- the
2 defendants have raised in their motion, and they have
3 raised in the federal case, we think it's a misplaced
4 argument. We think it's wrong, but one of their arguments
5 is the administrative agent and not us has the right to
6 bring this case. Indeed, in the motion to dismiss our
7 original complaint, the lender defendants, I think, on
8 Page 21 chide us for not interacting with the agent.
9 Well, we are interacting with the agent. We may have to
10 have the agent replaced. We have dialogue with the agent
11 that is moving. Now, I want to make clear what we're
12 trying to do is clear away the underbrush. We do not
13 believe -- and I'm happy to get into the merits of that
14 issue, but I don't think now is the time. We don't
15 believe that the agent has the right to bring the claims
16 that were alleged here, but we want to clear away that
17 issue. That's the second ground, and the third ground is
18 we do want to see what happens with the federal case,
19 because the federal case is moving. There will be a
20 ruling in the federal case that will affect what is going
21 on here, but, again, the question is not why do we want to
22 do this. The question is what is the prejudice, and let
23 me come back to the forum shopping and the judge shopping.
24 Forum shopping is when you go into another store. We're
25 only in one store, your Honor. It is your store. We're

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1 not in the federal court store. We didn't open the door
2 and walk in. Someone else did. So we're not forum
3 shopping, and we're not judge shopping, because if we are
4 allowed to discontinue without prejudice, and we file
5 again, the case will be marked as related, and we have
6 said in our papers, and I say it again, that we will -- we
7 understand that that case, if you'll have us, your Honor,
8 is coming back to you. So we're not forum shopping, and
9 we're not judge shopping, and also, the implication is we
10 are fearful -- we're terribly fearful that you will
11 immediately act on our original complaint and dismiss our
12 case. I suppose that's why they say we're frantically
13 shopping in another courthouse or for another judge. We
14 are not, and we don't think -- because this case is going
15 to change when any amended and supplemental complaint is
16 filed, we don't fear that, and interestingly, if the
17 defendants think that their arguments, and they have a lot
18 of rhetoric in their pleadings about how dare we move to
19 discontinue, if they are so sure of their position, then
20 I'm certain that Judge Daniels will recognize the virtue
21 of their arguments. He will dismiss their case, and they
22 will have even a stronger position, and they will make it
23 even less likely that we refile our complaint. So the
24 argument that they are somehow prejudiced by forum
25 shopping or judge shopping is incorrect.

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1 THE COURT: Okay.

2 MR. CLAYTON: Now, I think, your Honor, those
3 are, as I see it, the significant arguments that they
4 make. They wasted money on the preliminary injunction.
5 It doesn't work.

6 THE COURT: I'm just going to interrupt you,
7 because I am a little pressed for time. I have another
8 case at 3:30, and I want to make sure everyone has an
9 opportunity. So who is going to speak first for the
10 defendants? Mr. Mastro?

11 MR. MASTRO: Yes.

12 THE COURT: And I'm going to ask everyone else
13 to turn off their microphones.

14 MR. MASTRO: Technical assistance, your Honor.
15 I'm going to cut right to the heart of the matter, because
16 I heard some extraordinary things there. We have an
17 expression here in New York for Mr. Clayton's argument.
18 It's called "chutzpa." This is incredible, your Honor.
19 He just acknowledged --

20 THE COURT: I think that goes a little bit too
21 far. I have seen chutzpa. I'm sorry, Mr. Mastro. I
22 don't agree with you.

23 MR. MASTRO: Let me explain why I say that, your
24 Honor, because this is, your Honor, to paraphrase some
25 words I heard earlier, this is about trying to avoid you.

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1 This is about blatant --

2 THE COURT: The problem I have with that
3 argument, Mr. Mastro, I appreciate it, but that's
4 prejudice to me. That's not prejudice to you. What's
5 your prejudice?

6 MR. MASTRO: It's absolutely both a prejudice to
7 the Court and to us, because you've already invested
8 substantial time and resources in this case as have --

9 THE COURT: But you see -- I'm sorry to
10 interrupt. The argument was procedurally incorrect,
11 because as Mr. Clayton pointed out, he's right, if this
12 case is refiled in New York County, then it's coming back
13 to me. Whether I want it or not, it's coming back.

14 MR. MASTRO: Your Honor, with all due respect.

15 THE COURT: Of course I want it back. I just
16 love having you all before me.

17 MR. MASTRO: I would love for that to be the
18 case, but, your Honor, it's actually not the case when one
19 reads the related case law, and I have had experience
20 litigating it. If there's no case pending before you, the
21 case doesn't actually get assigned to you, whether he
22 wants to check the box or no, because the rule relates to
23 there has to be a pending case. So this will not go to
24 you. It will necessarily go to someone else even if Mr.
25 Clayton, I would take his word that he would check the

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1 box, even if he checked the box, it wouldn't go to you
2 directly. It would go to another judge, and then we
3 have --

4 THE COURT: Mr. Mastro, I would, if I were to
5 grant this motion, grant it on condition, which I am
6 allowed to do, which is, given your objection, that it
7 would be refiled and assigned to me again.

8 MR. MASTRO: Well, your Honor, I appreciate
9 that, but the literal words of the rule, and as it has
10 been applied, including, unfortunately, in another case in
11 which I was involved, the case was on appeal at the time,
12 and the administrative justice, you know, ruled that the
13 case should not -- the related case should not have gone
14 to the other judge.

15 THE COURT: Uh-huh.

16 MR. MASTRO: Your Honor, it doesn't actually go
17 back to you.

18 THE COURT: You're saying that it would be
19 randomly assigned.

20 MR. MASTRO: That's correct, your Honor. I
21 think if your Honor reviews the rule, and I'll be happy to
22 submit the administrative order in the case in which I was
23 involved --

24 THE COURT: I read that case actually.

25 MR. MASTRO: A black car assistance corporation

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1 case. Judge Engoron took the case, and you know, the
2 administrative judge, Justice Heitler, said it never
3 should have gone to you in the first place; it should have
4 never gone to the judge. It never got back to Justice
5 Engoron. I don't want to get --

6 THE COURT: Again, you know, that's still not
7 prejudice to you. That's my work, you know, in getting up
8 to speed on the case, not yours, and also, the preliminary
9 injunction, if I were to deny the motion to discontinue
10 the case today, you would be going forward with this case,
11 and you have spent the time and the money on the
12 preliminary injunction either way. If you win today, you
13 spent the money and the time on the preliminary
14 injunction. It's not a cost that you would have avoided
15 if they hadn't filed this motion.

16 MR. MASTRO: Your Honor, games are not only
17 played with you. They are being played with us. We have
18 now five months of delay that Mr. Clayton has effected.

19 THE COURT: So he didn't file this 30 days after
20 filing the motion -- filing the action?

21 MR. MASTRO: He did file it within the number of
22 days of filing the action after we had the most incredible
23 litigation activity, after we had, you know, fire drill
24 after fire drill. All of us had that fire drill, your
25 Honor, and I don't think -- your Honor, we would not be

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1 here right now if your Honor had granted them preliminary
2 injunction, if your Honor had found they were likely to
3 succeed, if your Honor found certain of their claims
4 instead of the other way around, were likely to survive
5 dismissal than likely to be dismissed like the implied
6 covenant claim.

10 MR. MASTRO: I understand, your Honor, but Mr.
11 Clayton, acting in concert with other similarly situated
12 lenders like LCM which was before your Honor or trying to
13 get before your Honor and trying to intervene, and then
14 just before your Honor ruled and then drops out and goes
15 into federal court. Mr. Clayton admitted --

16 THE COURT: I'm sorry. Hold on, please.

17 || (Pause.)

18 THE COURT: I'm sorry, Mr. Mastro. Go ahead.

19 MR. MASTRO: Mr. Clayton admitted it to you.

20 This has all been about, you know, in coordination
21 with LCM in the federal case wanting to see what happened
22 in the federal case, delaying this case.

23 THE COURT: How does that prejudice you?

24 MR. MASTRO: It completely prejudices us, your
25 Honor, because I find it incredible that he's in here

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1 arguing to you, don't worry about it, there's going to be
2 a federal decision now sometime after mid-January, when we
3 could have been fully briefed and have had a motion to
4 dismiss decided in this case well before then. He's
5 hoping -- this is blatant forum shopping and judge
6 shopping. He's hoping in the other forum he might get
7 some better relief through his surrogate litigant, LCM,
8 and your Honor that's prejudice to you and to us that we
9 are going through this.

10 THE COURT: The standard is prejudice to you.
11 It's not prejudice to me.

12 MR. MASTRO: I understand, your Honor, but we
13 have been prejudiced by the gamesmanship. We've been
14 prejudiced by the fact that they did this to avoid an
15 adverse -- a timely adverse ruling by you on motion
16 practice so they could string things out to get into the
17 federal court, and now we're having to brief the federal
18 court and then eventually come back to rebrief everything
19 with you. That's the definition of prejudice.

20 THE COURT: Actually, no, not under the cases.
21 That's not prejudice.

22 MR. MASTRO: Your Honor, I think that's
23 absolutely prejudice. Let me be clear. There are
24 multiple cases that have held -- First Department cases
25 that have held not only should you dismiss the case, but

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1 you should grant discontinuance with prejudice. I'm
2 talking, your Honor, about the NBN case. I'm talking
3 about the McNamara case. Under very much these
4 circumstances where these folks have a motion to dismiss,
5 they want to choose a new forum, because they don't like
6 how things have been going, they have parallel or related
7 cases pending elsewhere, and then they come before you and
8 say, let me have a voluntary dismissal without prejudice,
9 and the First Department has ruled in the NBN case and in
10 the McNamara case as well as the Jericho case, your Honor,
11 the First Department ruled that, in fact, the case should
12 be dismissed with prejudice either as a voluntary
13 dismissal with prejudice or otherwise, and your Honor, the
14 language has been crystal clear, because I know Mr.
15 Clayton has tried to pigeon hole it into the language of
16 Eugenia. This is only about, you know, about an issue of
17 prejudice in a case factually so dissimilar from ours,
18 because so little had happened in that case compared to
19 the burdens that all parties, including the Court, have
20 had to assume in this case, and your Honor, I simply point
21 out the exact language, the exact language that the First
22 Department has used in both of those cases that I just
23 cited to you. The exact language used was, quote, "Courts
24 properly discontinue" -- this is NBN Broad -- "where a
25 motion for summary judgment was pending, but not yet even

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1 fully submitted."

2 THE COURT: I'm sorry. Motion for summary
3 judgment. That is such a big difference between a motion
4 to dismiss and a motion for summary judgment. They were
5 much further along. I'll tell you something else, Mr.
6 Mastro, there's a case up in I think it was the Fourth
7 Department, Harris, that says that they don't even need
8 the Court's permission, because filing a motion to dismiss
9 is not a pleading.

10 MR. MASTRO: Actually, your Honor, I'm talking
11 First Department which is where we are.

12 THE COURT: You know what. There was a case in
13 the First Department, Judge Singh's case, where he got
14 reversed in 2014, but, you know, there's a more recent
15 case in 2019, and Judge Singh is actually on the panel.

16 MR. MASTRO: Well, your Honor, I refer you to
17 McNamara versus McNamara. That was a motion to dismiss,
18 not yet fully submitted and decided, 62 AD3d 619, 620.
19 That's a First Department 2009 case.

20 THE COURT: The case I'm referring to is a 2019
21 case.

22 MR. MASTRO: I understand. I'm sure they are
23 both good law. It may depend on their facts. McNamara is
24 surprising, strikingly similar to this case. A motion to
25 dismiss pending, McNamara brings parallel cases elsewhere,

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1 is trying to get away from that court before that motion
2 is decided, and the First Department, you know, altered
3 the discontinuance without prejudice.

4 THE COURT: The other problem with your
5 argument, Mr. Mastro, is that I could grant your motion to
6 dismiss, and then they would still have an opportunity to
7 replead.

8 MR. MASTRO: Your Honor, the fascinating thing
9 about this is that they have taken all this time, and I
10 heard all these arguments before that were made that the
11 Paul Weiss firm needed more time to study the final deal
12 documents. By the way, the key document they received,
13 they say they received two documents, they received in
14 June --

15 THE COURT: The term sheet.

16 MR. MASTRO: Not the term sheet. After the deal
17 closed, they received the final deal documents. They have
18 had those for months. That's one of the two documents
19 they received since the preliminary injunction. All
20 right. And, your Honor, they have had those documents for
21 months. They told you before they needed more time to
22 study them. Now they tell you that, you know, having
23 received that document, okay, they have all these -- they
24 have all of these new facts that they are ready to go with
25 when they say they only received two documents. Your

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1 Honor, they've had the final deal documents. They tell
2 you, we're going to make some wonderful new arguments.
3 All right. Yet, they waited and sat on their hands in the
4 hope of getting a federal ruling before you have a chance
5 to decide a motion to dismiss on whatever amendment they
6 did, and I suggest to your Honor that in that sense this
7 is very similar to cases like McNamara and Lui and Baltia
8 (phonetic) where there were attempts to get away from a
9 judge thinking that a judge was not inclined in their
10 direction. He sat there for five months not having
11 amended, all right, and now he comes to you and tells you
12 he has all of these great arguments. There are no great
13 arguments, your Honor. The deal documents speak for
14 themselves as they spoke for themselves at the preliminary
15 injunction motion phase, and they are not going to be able
16 to establish any claims, but they are the ones who really
17 sat on their rights, stringing out this Court and their
18 adversaries to force us to litigate in federal court first
19 before they are heard by this Court. It's wrong for you
20 and us. It is prejudice, and in the McNamara court, the
21 First Department said that the discontinuance was, quote,
22 "to avoid an adverse decision on a pending motion to
23 dismiss the complaint with prejudice and to enable the
24 plaintiff to raise the claim she makes herein in another
25 pending motion" that that is prejudice. That is wrong and

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1 your Honor shouldn't tolerate that, and in McNamara versus
2 McNamara, they changed the discontinuance to one with
3 prejudice on appeal.

4 So, your Honor, I respectfully suggest that we
5 have a situation where gamesmanship has been used seeking
6 a discontinuance without prejudice that has damaged us,
7 that has caused us and this Court to have to litigate an
8 issue that now Mr. Clayton is here arguing, basically, oh,
9 let me amend now, let me amend, and you know, then we'll
10 do motion practice, and by then he will have achieved his
11 sharp practice strategic objective of getting this strung
12 out until after the federal decision and the hearing in
13 January of 2021.

14 THE COURT: You know, the other problem, Mr.
15 Mastro, is you give me too much credit for being able to
16 get a decision out more quickly than a federal judge when
17 my staff is cut. I have 440 cases. Meanwhile, I did get
18 the injunction decision out as quickly as humanly
19 possible, because it was an injunction. You know,
20 unfortunately, things are slowing down here in the court;
21 so as a matter of reality is that it's unlikely you would
22 have gotten a decision before the federal action
23 progressed anyway. So there, too, I'm not seeing
24 prejudice.

25 MR. MASTRO: Your Honor, I would say this. I

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1 give your Honor all the credit your Honor is due. You
2 have been exemplary on this case in terms of work ethic,
3 diligence. Paul Weiss created this problem for you. We
4 had to go through fire drill after fire drill over those
5 initial weeks, and then Paul Weiss said, oh, we don't like
6 the preliminary injunction; let's slow everything down,
7 and we'll try to do a discontinuance after he had moved to
8 dismiss. Your Honor, we moved to dismiss in July, early
9 July, and your Honor, yes, had we just proceeded at pace,
10 I don't have any doubt given how familiar your Honor had
11 become with that record, and how well you had reviewed
12 those deal documents, which were plain on their face that
13 Paul Weiss' clients have no claim, you would have decided
14 this motion by now.

15 THE COURT: Well, I haven't seen the deal
16 documents yet. I've only seen the term sheet. Thank you
17 very much. I'm going to see if anyone else wants to speak
18 in addition to Mr. Mastro.

19 MR. LENDER: Your Honor, this is David Lender
20 from Weil Gotshal. I won't repeat the arguments that Mr.
21 Mastro made. I will say that I think he miscited the
22 case. The case is called McMahan, McMahan versus McMahan,
23 but as Mr. Mastro said, both Lui, McMahan, both First
24 Department cases where the issue was a motion to dismiss,
25 and the First Department denied a motion to discontinue,

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1 because it concluded that, essentially, the plaintiff was
2 trying to avoid a potential adverse ruling on a pending
3 motion to dismiss analogous to here. The only other point
4 I would like to add, your Honor, is if you're inclined to
5 grant the motion, we would respectfully request that you
6 award attorneys' fees and costs. It's interesting because
7 the leading cases that Paul Weiss cited in their brief,
8 both American Transit and Shamansky (phonetic), in both of
9 those cases -- there was no issue about trying to avoid an
10 adverse decision on the merits. That wasn't part of the
11 decisions, but in both of those cases, American Transit,
12 here's a quote from that, where they said "Any prejudice
13 to the defendants was properly obviated by awarding costs
14 and attorney fees to the defendants to compensate for the
15 time expended in the defense of the action to date."
16 That's one of Paul Weiss' cases. Same thing Shamansky
17 (phonetic). We also cited -- both of those are not in the
18 First Department. We also cited the Beagle (phonetic)
19 case from the First Department, Carter from the First
20 Department, and the reason I say that, your Honor, is if
21 you're not going to grant the motion because of the
22 prejudice, which is basically avoiding a potential adverse
23 ruling, the timing here is important. Right. They waited
24 until after we filed our motion to dismiss, after LCM
25 walked away from you and filed in federal court. Those

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1 are costs that we would not have incurred, and under
2 3217(b) your Honor is permitted to grant a motion to
3 discontinue upon any terms and conditions you deem proper.
4 Again, literally, the cases that Paul Weiss cites in their
5 brief to support their motion they granted fees to the
6 defendants in both of those cases. We wanted your
7 Honor --

8 THE COURT: You know, the problem with that
9 argument, Mr. Lender, is that we would have had and you
10 would have had to oppose a preliminary injunction motion
11 no matter what; so --

12 MR. LENDER: But not the motion to dismiss costs
13 here. If they would have filed their motion to
14 discontinue timely --

15 THE COURT: In most of my 440 cases, we get
16 motions to dismiss and plaintiffs filing amended
17 complaints all the time. This is no different than anyone
18 of the other cases.

19 MR. LENDER: It's only different here, because
20 of the issue of the timing, right, in the sense of the
21 arguments that we've made about trying to forum shop,
22 judge shop, avoid --

23 THE COURT: I don't buy those, though. That's
24 the problem. So, Mr. Clayton, do you have anything else
25 you want to say?

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1 MR. CLAYTON: Very, very briefly, your Honor.

2 No. 1, as we said in our papers, as I said in my argument,
3 if this case is refiled, we will do what we can to get it
4 back to you. I have not looked at what Mr. Mastro cited.

5 It's not cited --

6 THE COURT: He's right. He's right. It's only
7 related if there's a pending action, which is true, but --

8 MR. CLAYTON: I think there will be a way, your
9 Honor; so --

10 THE COURT: That would be up to the
11 administrative judge.

12 MR. CLAYTON: All I can say is that we will
13 cooperate in that way. No. 2, Mr. Mastro during his
14 presentation seems to spin off alternative facts. So, for
15 example, he said again and again, we delayed, we sat on
16 our hands. I say it again, and he agreed with it. First
17 he agrees with it, and then he contradicts it. We filed
18 the motion 29 days after we filed the complaint. I can't
19 sit on my hands that quickly, I have to say, and in
20 addition, he said, to kind of imply, I suppose, that we
21 set up the federal case. He used words like, if my notes
22 are correct, he called the federal court clients a
23 surrogate litigant for us. There's no basis for any of
24 that, nothing anywhere that he cites, not so, and what
25 he's trying to do is he's trying to make this a different

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1 kind of case. It would be a case in which they could
2 argue forum shopping had we filed the case in federal
3 court. We did not. Finally, your Honor, and then I will
4 stop, on the attorney fees, attorney fees are quite
5 extraordinary in cases of this kind, and as your Honor
6 said, they would have had to defend the preliminary
7 injunction. They made a motion to dismiss our current
8 pleading. That motion will be -- if this case continues,
9 that motion will be superseded. It's no different, as
10 your Honor said, from lots and lots of cases in this
11 court. Thank you for your time.

12 THE COURT: I see you, Mr. Mastro. What would
13 you like to say?

14 MR. MASTRO: I'll be brief.

15 THE COURT: Mr. Lender and Mr. Clayton, turn off
16 your microphone.

17 MR. MASTRO: Thank you, your Honor. What I
18 meant by delay, your Honor, is the motion may have been
19 timely brought, but we have had extensions, extensions
20 granted to Paul Weiss, because of Mr. Clayton's or other
21 schedules. Your Honor, I want to be very clear. I think
22 the correct disposition of this is that if they want a
23 voluntary dismissal it should be with prejudice, but your
24 Honor, he's saying that he's going to bring it back before
25 you. The only way to guarantee that is to keep the case

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1 on. I will tell you this. We moved to deny the voluntary
2 discontinuance without prejudice or alternatively to have
3 it, you know, granted with prejudice. You should deny
4 this motion. We should be going forward before your
5 Honor. This should not be about gamesmanship of who is
6 working with who on the federal side. This is a real live
7 case where we have a motion pending. If he's got an
8 amendment, show your cards, Mr. Clayton. Don't tell us
9 five months later that you finally analyzed the deal
10 documents and you think you have some new argument. It's
11 not going to be there. There's no there there. Show your
12 cards, make your amendment, and we'll bring on our motion
13 here before your Honor and get this case resolved. That's
14 the correct disposition here. He has not made the case
15 for a voluntarily dismissal, and whether your Honor buys
16 forum shopping or not, there are a lot of things that
17 smell about this whole situation. They have not made the
18 case for a voluntary dismissal without prejudice. They
19 have clearly had, as Mr. Clayton admitted, a design on
20 having the federal case decided before your case, and
21 therefore, you should deny this, and let us get on with
22 our motion which is we made our motion. Let it go. Let
23 him amend if he wants to amend. Let us go. The only way
24 your Honor can keep the case for sure is to do that, and
25 we want the cases to be decided here and now. Thank

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1 you.

2 THE COURT: All right.

3 MR. CLAYTON: Your Honor, just one moment, if I
4 may. That's a misstatement of the governing law, but,
5 again, Mr. Mastro says we had extension after extension at
6 Mr. Clayton's request. There was one extension that I
7 requested, because the date that was set which was in
8 mid-November I was supposed to be in an expedited trial in
9 Detroit, and I asked for professional courtesy to do that.
10 It was granted and that was the one extension. Again,
11 alternative facts are not allowed in court, maybe in
12 political discourse in the United States, but not here.

13 THE COURT: All right. Thank you very much.
14 It's 3:17 and I have another case on at 3:30, and so I'm
15 going to make a decision on the record and direct that you
16 get the transcript. The motion is granted. I am going to
17 provide that if the action is refiled in this court that
18 it be re-assigned to me which I think addresses the
19 defendants' concern about forum shopping which I don't
20 actually agree with, but I think it addresses that
21 concern. The standard under 3217(b) is prejudice to
22 defendants, and I just have not heard such prejudice, and
23 instead, the defendants have been asking the Court to
24 scrutinize the plaintiffs' motives, and in fact, that was
25 Mr. Mastro's last closing argument, that they haven't made

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1 the case, the plaintiffs haven't made the case. Well,
2 scrutinizing the plaintiffs' motive is actually not the
3 appropriate analysis at that point. Later on in the case
4 the scrutiny of the plaintiffs' motive increases as the
5 case progresses, but here I have a motion that was filed
6 30 days after the case was initiated. The case was
7 initiated to stop a transaction. So the timing was not
8 actually within the plaintiffs' hands in this case. In
9 other cases where I've had requests to stay or requests
10 to -- mostly requests to stay it's been because the
11 consideration for the Court was that the timing had been
12 selected by the plaintiff, and that's just not the case
13 here. The plaintiff was in a position to have to move
14 very quickly, because of the timing of the deal, and so
15 that's one of the reasons I think that they get to make
16 this motion, and one of the reasons I'm granting it. You
17 know, as I said before, there's a conflict in the First
18 Department between 315 West Enterprises, a 2019 case, 171
19 AD3d 466, and EDO USA LLP, a 2014 case, 113 AD3d 507,
20 2014, also First Department, about whether they even have
21 to get the permission of the court when a motion to
22 dismiss has been filed. I will put in the order that it
23 should be, you know, re-assigned to the Court. I am not
24 granting the request for attorneys' fees and costs,
25 because as I said, it's not like you would have avoided --

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1 you would have had this cost no matter what, whether the
2 Court grants this motion or not. In fact, it's
3 inconsistent to be asking for the attorneys' fees when
4 you're simultaneously arguing for the Court to continue
5 the case in which case you certainly wouldn't be entitled
6 to the attorneys' fees. Finally, one of the arguments
7 about prejudice, the Court granting the motion but with
8 prejudice, and I'm denying that request as well, because
9 New York favors decisions on the merits, and as I said,
10 during the arguments, and I will sign the transcript, but
11 even if the motion to dismiss had gone forward, and if the
12 motion to dismiss or motions to dismiss had been granted,
13 the plaintiff could still amend after that, so, again, not
14 prejudice. So for all of those reasons, and based on your
15 excellent argument -- let me just add, in terms of the
16 reliance on Jericho, okay, Jericho not persuasive as in
17 that case it was the third action. It's just the timing
18 here, 30 days after filing the complaint, versus there
19 being the third action that had been filed by the
20 plaintiff. McMahan, M-c-m-a-h-a-n, I don't know how you
21 pronounce that correctly, to be honest with you, but same
22 thing, untimely. It was seven months after commencing the
23 action, and Lui, L-u-i, against CPC, the plaintiff had
24 already amended the complaint once. So for all of those
25 reasons, the motion is granted, and I thank you all. So

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1 nice to see you, and Mr. Court Reporter, we have seven
2 minutes till the next case. So have a nice evening,
3 everyone. Take good care, and I'm sure I'll see you in
4 one way or the other soon.

5 MR. CLAYTON: Thank you, your Honor.

6 THE COURT: Please, Mr. Clayton, you're going to
7 get the transcript. Okay?

8 MR. CLAYTON: Yes, we will.

9 THE COURT: Thank you.

10 3:24 p.m.

11 (End of proceedings.)

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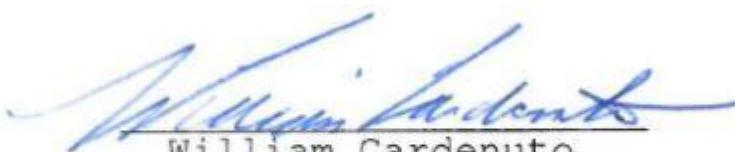
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14 It is hereby certified that the foregoing is a true and
15 accurate transcript of the proceedings.

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William Cardenuto
Senior Court Reporter

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